IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 109

SEA-LAND SERVICE, INC., *Appellant*,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL., *Appellees*.

On Appeal from the United States District Court for the District of Connecticut

BRIEF OF SEA-LAND SERVICE, INC., IN OPPOSITION TO MOTION TO AFFIRM

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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OCTOBER TERM, 1961

No. 945

SEA-LAND SERVICE, INC., *Appellant,*

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BRIEF OF SEA-LAND SERVICE, INC., IN OPPOSITION TO MOTION TO AFFIRM

Certain statements in the appellee's Statement of the Case should be commented upon. Their statements at pages 2 and 3 that the Sea-Land service, whose rates the railroads have sought to equalize, is comparable to the all-rail TOFC services, as well as the all-rail box car services, in the eyes of the shipping public is, of course, completely contrary to the findings of the Commission and receives no support in the opinion of the court below. At all events these statements

have no bearing upon the matters presented to this Court or upon the question of whether or not probable jurisdiction should be noted.

Appellees state that the "only basis" used by the Commission in holding the TOFC rates unlawful was that unless Sea-Land was allowed to publish differentially lower rates "it would lose traffic to the railroads thereby impairing its ability to continue in the trade" (p. 4) and later (p. 5) that the Commission found the rail rates unlawful for no reason other than that they threaten to divert traffic from Sea-Land. This is, to say the least, a mild characterization of the basis for the Commission decision. Actually the Commission found that a mode of transportation, the fostering of which had been held by the Commission and the Congress to be in the national interest and required by the national defense, is threatened with extinction if the railroads are permitted to wipe out the time honored rate differentials and to publish rates via their expedited, blue ribbon TOFC services on the same level as those maintained by the water carriers. There is involved not simply a question of one carrier mode losing traffic to another but a question of whether of not an entire form of domestic transportation is to survive or perish.

The appellees state further that to protect Sea-Land's traffic "from fair price competition the Commission prescribed" a 6 per cent differential in Sea-Land's favor (p. 4). The Commission did not "prescribe" a 6 per cent differential. It merely found that in the circumstances shown in connection with the particular 66 rates at issue the maintenance of rates less than 6 per cent higher than the competitive

Sea-Land rates would be competitively destructive (313 I.C.C. 47).

The appellees state (p. 4) that "the Commission made it clear beyond all doubt that the condemnation of the rail rates was not based upon any finding that Sea-Land enjoyed an inherent advantage of lower costs than the railroads"; that the Commission indicated that it could not determine on the record whether the railroads or Sea-Land had the economic advantage of being the lower cost agency. The fact is that the Commission very clearly found that with respect to the 66 TOFC rates at issue—*the only rates which are involved in the instant proceeding*—the Sea-Land service is the low cost service. (313 ICC 46, para. 2) The lower court erroneously ignored that finding. It is, of course, true that the Commission also found that "in the exceptional circumstances here presented, other considerations (than cost), herein discussed, appear to us determinative of the issues" (p. 46). But even under the application here of a "relative cost" theory the rail TOFC rates were subject to condemnation on the ground that they had been found by the Commission to apply to the higher cost mode.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND SHOULD BE RESOLVED BY THIS COURT

At issue in this proceeding, among other things, is the interpretation of the words "unfair or destructive competitive practices" as contained in the National Transportation Policy, which policy is specifically referred to in Section 15a(3) of the Interstate Commerce Act. The Commission interpreted these words in one way and the lower court in another. The appellees, while satisfied with the lower court's reversal of the Commission's order, are understandably un-

happy with its interpretation of "unfair or destructive competitive practices" and seek to shrug that interpretation off by arguing that it constitutes "an extended dictum" (p. 11). They contend that the court did not in fact fix relative cost as the sole standard to be applied by the Commission in intermodal rate controversies. While appellees' disavowal of relative cost as the necessarily controlling rate making factor is to be commended, we submit that the very vehemence with which they have relegated the lower court's findings in this area to the status of "dictum" points up clearly their own misgivings.

It is noteworthy that the appellee's views in this regard are not shared by the court in *Missouri Pacific Railroad Company* v. *United States*, 203 F. Supp. 629 (E. D. Mo. 1962), cited by appellees at pages 9 and 10 of their Motion. That court stated that "competition is destructive and unlawful under the *Pan-Atlantic* definition (referring to the court's decision hereinbelow) *only* when (1) rates are so low as to harm the proponent thereof or (2) so low as to deprive the competitor of his advantage of being the low cost mode." (p. 634) (emphasis added)

Thus there is a substantial difference of opinion as to whether or not the lower court's decision here does in fact virtually strip the Commission of its rate making powers in intermodal rate controversies, and relegate to it the role of "computer of costs." The very fact that this difference of opinion exists is a compelling reason why this Court should note probable jurisdiction. Unless and until the wide differences in the interpretations of Section 15a(3) are once and for all resolved there can be nothing but harmful uncertainty in the field of intermodal rate making.

CONCLUSION

Appellee's have not denied that this is a case of first impression—that it involves the first judicial interpretation of the so-called Rule of Rate Making enacted in 1958. They do not deny that this is the first time that this Court has been called upon to construe the term "unfair or destructive competitive practices" as that term is incorporated by reference in that rule. They can not reasonably deny that the future of an entire mode of transportation hangs upon the judicial determination of the question of whether or not the Interstate Commerce Commission or the lower court erred in applying this new rule of rate making.

In the circumstances we submit that the questions presented are substantial, warranting plenary consideration by this Court, and that the Motion to Affirm should be denied.

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June 15, 1962

Proof of Service

I, Warren Price, Jr., attorney for Sea-Land Service, Inc., appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of June, 1962, I served copies of the foregoing Brief of Sea-Land Service, Inc. in Opposition to Motion to Affirm on the several parties hereto as follows:

1. On the United States, by mailing copies, in duly addressed envelopes, with first class postage prepaid, to Robert C. Zampano, Esq., United States Attorney for the District of Connecticut, Federal Building, New Haven, Connecticut; to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; to Honorable Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.; and to Richard H. Stern, Esq., Antitrust Division, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with first class postage prepaid to Robert W. Ginnane, Esq., General Counsel, Interstate Commerce Commission, Washington 25, D. C.; and to B. Franklin Taylor, Jr., Esq., Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the Appellees herein, by mailing copies in duly addressed envelopes, with first class postage prepaid to their counsel of record as follows: Eugene Hunt, Esq., and Thomas P. Hackett, Esq., 54 Meadow Street, New Haven 6, Connecticut; Carl Helmetag, Jr., Esq., 1138 Transportation Center, Six Penn Center Plaza, Philadelphia 4, Pennsylvania.

4. On the Appellant in No. 946, Seatrain Lines, Inc., by mailing copies in duly addressed envelopes with first class postage prepaid, to its counsel of record as follows: Alan S. Fuller, Esq., and Ralph D. Ray, Esq., Chadbourne, Parke,

Whiteside & Wolff, 25 Broadway, New York 4, N. Y.; Gumbart, Corbin, Tyler & Cooper, 205 Church Street, New Haven Connecticut.

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